

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





# 75-1396

To be argued by  
GEORGE E. WILSON

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 75-1396

75-1397

75-1398

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

MARCUS GEORGE HERO,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

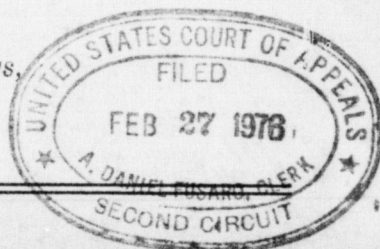
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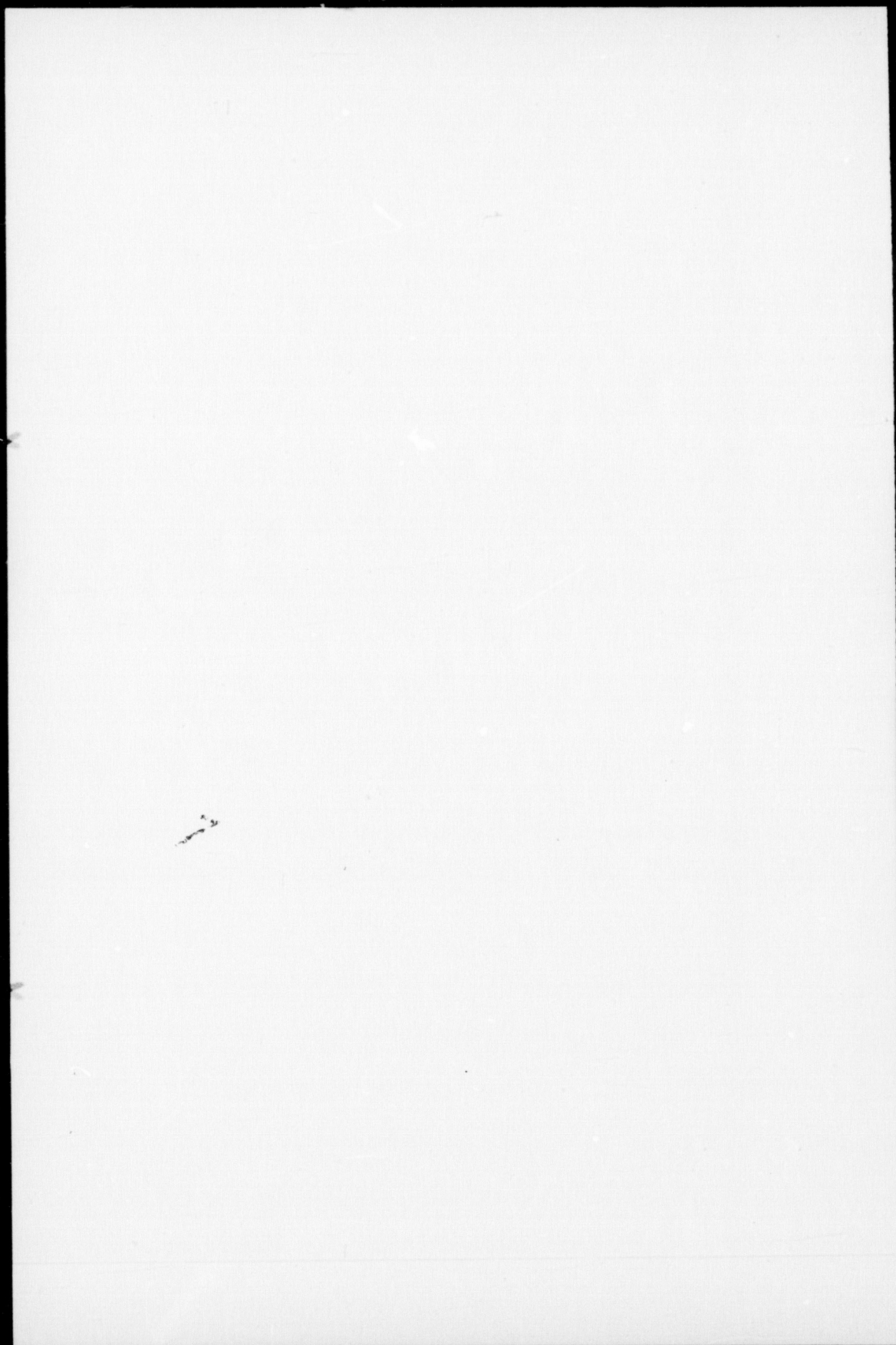
### BRIEF FOR THE UNITED STATES OF AMERICA

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## TABLE OF CONTENTS

	PAGE
Preliminary Statement .....	1
Statement of Facts .....	3
Government's Case .....	3
a. Introduction .....	3
b. Catale Joins Hero, Randell and Devins: the ill-fated Smokewatchers loan applica- tions .....	5
c. The Modern Century loan (74 Cr. 1951)	7
d. The Mini Loan (74 Cr. 1055) .....	10
e. The Modern Century Payoff (74 Cr. 1051)	11
f. The Mini Payoff (74 Cr. 1055) .....	13
g. The Smokewatchers Extortion .....	13
h. The Northstate Conspiracy (74 Cr. 1053)	15
i. The Coverup by Hero and Saks .....	18
j. Saks Cooperates .....	19
Defendant's Case .....	20
ARGUMENT:	
POINT I—Hero's consolidated trial on the four in- dictments before a single jury was entirely proper .....	22
POINT II—The District Court correctly denied Hero's motion for a new trial premised on alleged "newly discovered evidence" .....	28
CONCLUSION .....	33

## TABLE OF CASES

	PAGE
<i>Brown v. United States</i> , 333 F.2d 723 (2d Cir. 1964)	28
<i>United States v. Antonelli Fireworks Co.</i> , 155 F.2d 631 (2d Cir.), <i>cert. denied</i> , 329 U.S. 742 (1946)	23
<i>United States v. Costello</i> , 255 F.2d 876 (2d Cir.), <i>cert. denied</i> , 357 U.S. 937 (1958)	28
<i>United States v. Frank</i> , 494 F.2d 145 (2d Cir.), <i>cert. denied</i> , 419 U.S. 828 (1974)	33
<i>United States v. Lombardozzi</i> , 343 F.2d 127 (2d Cir.), <i>cert. denied</i> , 381 U.S. 938 (1965)	28
<i>United States v. Marionne</i> , 514 F.2d 1244 (5th Cir. 1975)	23
<i>United States v. Marquez</i> , 363 F. Supp. 802 (S.D. N.Y. 1973) (Weinfeld, J.), <i>aff'd on the opinion below</i> , 490 F.2d 1383 (2d Cir.), <i>cert. denied</i> , 419 U.S. 826 (1974)	31
<i>United States v. Nadler</i> , 353 F.2d 570 (2d Cir. 1965)	23, 25
<i>United States v. Papadakis</i> , 510 F.2d 287 (2d Cir.), <i>cert. denied</i> , 421 U.S. 950 (1975)	26, 27
<i>United States v. Parness</i> , Dkt. No. 75-1369 (2d Cir. Jan. 12, 1976)	32
<i>United States v. Polisi</i> , 416 F.2d 573 (2d Cir. 1969)	28
<i>United States v. Pordum</i> , 451 F.2d 1015 (2d Cir. 1971), <i>cert. denied</i> , 405 U.S. 998 (1972)	32
<i>United States ex rel. Regina v. LaValle</i> , 504 F.2d 580 (2d Cir. 1974), <i>cert. denied</i> , 420 U.S. 947 (1975)	31
<i>United States v. Rosenthal</i> , 470 F.2d 87 (2d Cir. 1972), <i>cert. denied</i> , 412 U.S. 909 (1973)	25



	PAGE
<i>United States v. Sanchez</i> , 459 F.2d 100 (2d Cir.), cert. denied, 409 U.S. 864 (1972) .....	32
<i>United States v. Schwartzbaum</i> , Dkt. No. 74-1901 (2d Cir., Nov. 7, 1975), Slip Op. 461 .....	28
<i>United States v. Silverman</i> , 430 F.2d 106 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971) .....	28
<i>United States v. Smith</i> , 112 F.2d 83 (2d Cir. 1940)	26
<i>United States v. Sposato</i> , 446 F.2d 779 (2d Cir. 1971) .....	28
<i>United States v. Stofsky</i> , Dkt. No. 74-1860 (2d Cir., Nov. 7, 1975), Slip Op. 515 .....	28
<i>United States ex rel. Tarallo v. LaVallee</i> , 433 F.2d 4 (2d Cir. 1970), cert. denied, 403 U.S. 919 (1971) .....	26
<i>United States v. Weber</i> , 437 F.2d 327 (3d Cir. 1970), cert. denied, 402 U.S. 932 (1971) .....	23
<i>United States v. Welsh</i> , 15 F.R.D. 189 (D.D.C. 1953)	23
<i>United States v. Williamson</i> , 482 F.2d 508 (5th Cir. 1973) .....	26
<i>United States v. Zane</i> , 507 F.2d 346 (2d Cir. 1974), cert. denied, 421 U.S. 910 (1975) .....	32
<i>Williams v. United States</i> , 168 U.S. 382 (1897) ....	23



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## BRIEF FOR THE UNITED STATES OF AMERICA

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### Preliminary Statement

Marcus George Hero appeals from judgments of conviction entered November 18, 1975 in the United States District Court for the Southern District of New York after a consolidated trial on four indictments (74 Cr. 1051, 74 Cr. 1053, 73 Cr. 1054 and 74 Cr. 1055), lasting 12 days, before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment 74 Cr. 1051, filed November 8, 1974 in three counts, charged Hero, Leonard Randell, Gerald Devins, and Gordon M. Saks with conspiracy to defraud the Small Business Administration ("SBA") and to violate 18 U.S.C. §§ 201, 1001, and 1014, and 15 U.S.C. § 645(a) all in violation of 18 U.S.C. § 371; and with

making false statements to the SBA and to a bank insured by the F.D.I.C., in violation of 18 U.S.C. §§ 1001 and 1014, respectively, in connection with an SBA loan for Modern Century Company, Incorporated ("Modern Century").

Indictment 74 Cr. 1053 filed November 8, 1974 in three counts, charged Hero and Saks with conspiracy to defraud the SBA and to violate Title 18, United States Code, Sections 201 and 1001, and Title 15, United States Code, Section 645(a), all in violation of 18 U.S.C. § 371; and with making false statements to the SBA in connection with several SBA loan applications, including one by the Northstate Packing Company, Inc. ("Northstate"), in violation of 18 U.S.C. §§ 1001 and 2.

Indictment 74 Cr. 1053, filed November 8, 1974 in three counts, charged Hero, Randell and Devins with conspiracy to defraud the SBA and to violate 18 U.S.C. §§ 201, 1001 and 1041; and 15 U.S.C. § 645(a), all in violation of 18 U.S.C. § 371; and with making false statements to the SBA, and a bank insured by the F.D.I.C., in violation of 18 U.S.C. §§ 1001 and 1014, respectively, in connection with an SBA loan for Mini Enterprises, Inc. ("Mini").\*

The fourth indictment, 74 Cr. 1054, filed on November 8, 1974 in two counts, charged Hero with obstruction of interstate commerce by extortion, and conspiracy to do so, in violation of 18 U.S.C. §§ 2 and 1952, in connection with an application to the SBA for a loan for

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\* The conspiracy count of 74 Cr. 1055 was dismissed after Judge Gagliardi ruled that it and the conspiracy charged in 74 Cr. 1051 (Modern Century) were multiplicitous and that the government would have to choose between them. The government elected to proceed on the Modern Century conspiracy (Tr. 1440). All references to "Tr." are to the trial transcript.



Smokewatchers International, Inc. ("Smokewatchers"). This indictment was dismissed by the court at the close of all the evidence.

Trial began on March 17, 1975 and ended on April 1, 1975 when the jury found Hero guilty of all counts in Indictments 74 Cr. 1051 and 1053 and Counts Two and Three of Indictment 74 Cr. 1055.\* On November 18, 1975 Judge Gagliardi sentenced Hero to concurrent terms of six months' imprisonment on each of the counts of each indictment, followed by one year of probation.

## **Statement of Facts**

### **Government's Case**

#### **a. Introduction**

The evidence adduced at trial showed that during a 20 month period which began in the fall of 1972, Marcus George Hero, a financial consultant and former SBA employee, engaged in a series of schemes with various others to defraud the SBA in connection with over a million dollars in loans. These loans, some of which were guaranteed, and others made directly, by the SBA, were guided by Hero to approval by means of his connections inside the SBA and his use of bribes and kickbacks.

In October 1972, two fraudulent loan applications, each for \$350,000 (Modern Century— 74 Cr. 1051, and Mini—74 Cr. 1055) were assembled under Hero's direct supervision, with the aid of his co-conspirators Gerald

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\* Randell was severed because of illness. His case still awaits trial. Devins was severed because his counsel was engaged in another trial. Saks pled guilty to Count One of Indictment 74 Cr. 1051 and was sentenced on November 17, 1975 on that indictment and on his plea to another related indictment (74 Cr. 778).

Devins, an accountant, and Leonard Randell, the president of a Small Business Investment Company. Assisting them on the Modern Century loan was Gordon Saks, another co-conspirator. Assisting them in the Mini loan was Salvatore Catatanotto (a/k/a and hereinafter "Catale"), an accountant for the Joseph P. Kennedy foundation and an unindicted co-conspirator along with Nicolas Costa and Carolyn Ugiss. Catale also convinced the bank to approve both loans. Hero, Devins and Randell received 20 percent of each loan, part of which Hero needed to pay bribes to officials of the SBA.

Later in late March or early April of 1973, Hero attempted to obtain a \$60,000 bribe for his friends in the SBA from Costa, the president of Smokewatchers, so that the SBA would approve a guarantee for a loan to Smokewatchers by a private lending institution.

During the fall of 1973, Hero and Saks prepared and submitted to the SBA two other fraudulent applications (Northstate Packing and Cheung's Gardens), for a total of \$120,000 in direct loans from the SBA. For his role in the foregoing, Hero received \$6,500 from Saks, part of which was to be paid in bribes to SBA officials.

Finally, in June of 1974, Hero and Saks again prepared and submitted two fraudulent applications to the SBA, for a total of \$200,000 in direct loans from the SBA (Clayton Camper and State Appliance).

In each of the foregoing instances, Hero used his corrupt influence at SBA to assure the approval of the loan applications.

**b. Catale joins Hero, Randell and Devins: the ill-fated Smokewatchers loan applications**

During the summer of 1972, Catale and Nicholas Costa, both officers of Smokewatchers,\* applied for a \$350,000 SBA guaranteed loan. During that same period, while looking for television advertising time to promote their products (Tr. 271), they met Leonard Randell who they had learned might be able to provide both television advertising time and interim financing for Smokewatchers (Tr. 271-272). Randell introduced them to Gerald Devins, who was characterized as a financial consultant who had television time to sell (Tr. 274).

In September of 1972, Devins, through his company Vacation Club International Limited, sold Smokewatchers \$100,000 worth of pre-paid prime rate television advertising time ("TV time") for 99,000 shares of Smokewatchers stock (GX 36; Tr. 132-133).\*\* Later, when Costa tried to use the time, he learned from Elvin Feltner, the president of Transamerica Film Corp., which actually owned the time, that Devins never had it to sell (GX 36, 36A; Tr. 275-277, 1066).

1. October of 1972 in Randell's presence, Devins invited Catale to join them in doing SBA loans. Catale would use his contacts at the 10 to 15 banks which he

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\* Smokewatchers was a public corporation in the business of smoke deterrence. Using an international franchising system and methods similar to Weightwatchers, Smokewatchers would run anti-smoking clinics and market anti-smoking books, lozenges and vitamins which had been developed after two years of extensive research. At the time Smokewatchers went into bankruptcy in September of 1973, it had about 230 franchises in the United States, Canada, Europe and Latin America (Tr. 268-270).

\*\* References to "GX" are to government exhibits.



dealt with in his work with the Kennedy Foundation; Devins would do the accounting; and Randell would furnish prospective borrowers from among his clients. A fourth person, Hero, was described by Devins as a former expert of the SBA \* who had the necessary knowledge and connections at the SBA (Tr. 138-236). Hero would prepare papers and oversee the operation. The compensation would be as follows: 2 percent of the acquired loan each for Catale, Randell, Devins, Hero, and an unnamed messenger. In addition 10 percent would be paid to the pertinent people in SBA by Hero (Tr. 139-40).

On October 12, 1973, the SBA rejected Smokewatchers' loan (GX 35). Randell and Devins notified Costa and Catale (Tr. 141, 280), offering to re-work the loan application using the \$100,000 worth of TV time as an additional asset on Smokewatchers' financial statements. During the evening of October 19, 1972, while they were revising the Smokewatchers application, Devins told Catale that it would cost 20 percent, or \$70,000, divided as previously explained to get the new application approved. Devins also told Catale that he had to secure approval for a \$350,000 loan for Modern Century, for which he would receive a fee of 2 percent, or \$7,000 (Tr. 145).

The next morning, October 20th, Catale submitted the revised Smokewatchers loan application along with the Modern Century application to Underwriters Bank and Trust ("Underwriters"). Both applications were approved by the bank and forwarded to the SBA, which subsequently approved Modern but rejected Smokewatchers a second time.

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\* Hero had been employed at the SBA as a financial specialist from 1961 until 1966 (Tr. 915).

**c. The Modern Century loan (74 Cr. 1051)**

A few days before the Smokewatchers application was revised Devins called Gordon Saks \* to tell him that he had someone from the Kennedy Foundation who had a lot of contacts and could arrange for an SBA loan for Saks' company, Modern Century Publishing Company. The next day, October 17, 1972 Saks and Repass met with Randell and Devins at Devins' office at Island Park, New York. Randell explained that he and Devins had come across a quick method of getting Modern Century necessary financing through a \$350,000 SBA guaranteed bank loan. Pursuant to Randell's demands, it was agreed that upon consummation of the loan he, Devins and another would receive 20 percent of the face amount of the loan as fees (\$35,000 in cash for the SBA people and the rest in checks); 10 to 15 percent of the corporation stock; \$500 a month in consulting fees (each to Randell and Devins); and a lease of space in Devins' office building at \$500 per month was to be furnished by Modern Century (Tr. 409, 586). Shortly thereafter, Hero arrived and was introduced by Devins as the one who would help them with the loan application and handle relations with the SBA. Hero said that he controlled the people on the inside of the SBA. For this, according to Randell, Hero's cut was 10 percent (Tr. 587-588).

Hero then produced SBA forms and told Saks and Repass item by item in some detail how they should be filled out. Together they worked on the draft of the

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\* Saks was the chairman of the board and Richard Repass was the president of Modern Century Publishing Company. During the late summer of 1972 Modern was in dire financial straits and had defaulted, for lack of capital, on \$1,000,000 of publishing contracts (Tr. 407). Saks and Repass had met Devins through Randell (one of Saks' creditors), in late June of 1972 (Tr. 58, 579). Devins wanted to sell Modern TV time to buttress its stated assets (Tr. 402-403).

application and the financial statements (GX 11A, C, D, E, F, G, H; Tr. 412, 600).

Hero said that since they were a publishing company they could not qualify for an SBA loan. It was decided that Modern Century would falsely present itself as a distribution company, which would qualify (Tr. 593). The corporate name was changed from Modern Century Publishing Company to Modern Century Company (GX 14; Tr. 590-591).

Hero warned Repass not to show the names of Randall, Devins and Hero in the answer to question 10 of the application regarding compensation \* because the application would not be approved if they did (Tr. 417). Additionally, the use of proceeds, collateral, assets, gross sales, sales returns, profit and projections were all either nonexistent or overstated by over a million dollars (GX 11E, F, G, H, I; Tr. 424-437, 594-601).

The next morning Repass took the completed application to Hero for a final review. Thereafter, he met Saks,

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\* Question 10 of the application provided:

"10. NAMES OF ATTORNEYS, ACCOUNTANTS, AND OTHER PARTIES. The name of all attorneys, accountants, appraisers, agents, and all other parties (whether individuals, partnerships, associations or corporation (engaged by or on behalf of the applicant (whether on a salary, retainer or fee basis and regardless of the amount of compensation) for the purpose of rendering professional or other services of any nature whatever to applicant, in connection with the preparation or presentation of this application to Bank in which SBA may participate or any loan to applicant as a result of this application; and all fees or other charges or compensation *paid or to be paid* therefor or for any purpose in connection with this application or disbursement of the loan whether in money or other property of any kind whatever, by or for the account of the applicant, together with a description of such services rendered or to be rendered, are as follows:"



Randell and Devins at Randell's office where Randell increased the terms for their services (Tr. 443-444, 450, 614, 617). Later Hero took a final look at the application and told Saks to take it to Sal Catale who would take it to Underwriters (Tr. 414, 617). The application was submitted with the Smokewatchers application on October 20, 1972.

By 1972 Thomas E. Darrow, a vice president of Underwriters with overall supervision of the loan portfolio, had known Catale for about 15 years through Catale's connection with the Kennedy Foundation, for which Catale handled accounts with various banks where Darrow had worked. The organization had over a million dollars on deposit at Underwriters. When Catale presented the Modern Century loan application he told Darrow that he had just returned from Washington and that Senator Kennedy was interested in Modern receiving a loan (Tr. 79). Darrow had John Gallagher, his credit analyst, process the application. Gallagher reviewed the various documents and supporting papers in the application (GX 11A, 11C, 11F, 11G, 11-I, 22D, 22E), all of which he considered essential. Of special importance to the bank was the existence or absence of excessive finders' fees (Tr. 86, 101). Gallagher then prepared his report for Darrow (GX 15), who approved the loan subject to a 90 percent guarantee which he requested from the SBA.

John Gaeta, chief of the Financing Division for the New York District SBA office, supervises all of the loan officers for that district. After an application is forwarded by a bank to the SBA it is logged in and assigned to a loan officer who analyzes it and writes a report (GX 11J; Tr. 11-13, 20). Among the factors which are considered in processing a loan is the net worth of the business, past operations, current assets and liabilities, collateral, use of proceeds and the projections and the

nature and extent of compensation paid or to be paid by the borrower for assistance in preparation of the application (Tr. 29-33).

After Modern Century's application had been accepted, Hero called Repass and told him that the SBA had approved the loan (Tr. 451).

**d. The Mini Loan (74 Cr. 1055)**

On the evening of October 20, 1972 Costa called Devins and was told that while the Modern Century loan had been accepted, the Smokewatchers application had been rejected a second time by the SBA (Tr. 283). Later Devins and Randell met with Costa and Catale. Devins explained that anything with the Smokewatchers name would not go through because of politics.\* He said that the loan could go through under another corporation and that they would prepare the new application for the same fee. Catale had a corporation called Mini Enterprise, Inc. (formed in 1969 to obtain a Mini Pearl fried chicken franchise), which had never done any business and had been dissolved for non-payment of taxes (Tr. 150). Catale had the corporation reinstated (GX 3) and on October 30, 1972 Catale, Costa, Devins, Randell, Hero and Costa's secretary, Carolyn Ugiss, met at Devins' office on Long Island. Costa brought material from the rejected Smokewatchers applications and product information from its files. Randell discussed the product information and various questions on the loan application with Hero (Tr. 287) who penciled in the answers to the questions (Tr. 160). Hero had Ugiss delete the name

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\* The original loan had been packaged and presented in Smokewatcher's behalf by Eugene Foley, a former Director of the SBA who, according to Devins, was "not liked" in the New York office (Tr. 147).



"Smokewatchers" in two letters from distributors and substitute "special formula," in order to avoid any mention whatever of Smokewatchers. The application falsely stated that Mini had been engaged in research and development in the field of smoking deterrence for two years (Tr. 155, 160-161). Devins took figures from the Smokewatchers application which he and Catale, supervised by Hero (Tr. 288), used to fabricate a false balance sheet (GX 1G; Tr. 158-159, 219), and description of collateral (GX 1H; Tr. 163). They had Ugiss retype the product information and supporting documents (GX 1A, 1C, 1D, 1E, 1F; Tr. 291, 331-335), and Hero told her to put herself down as a vice-president and director of Mini (Tr. 287, 350, 540).

After the application was completed, Hero, Devins, Costa and Catale reviewed it and, on the next morning, October 31st, Catale submitted it to Underwriters. Catale told Darrow that Mini was an affiliate of Smokewatchers with the same stockholders and that Smokewatchers would guarantee the loan. Furthermore, Catale falsely told Darrow that the Kennedy Foundation had indicated that it was willing to put up as much as \$300,000 to back Mini (Tr. 80-81). Placing great reliance on Catale's representations, Darrow had Gallagher analyze the Mini loan application. Gallagher then considered the balance sheet, projections of earnings and various articles written on the products that Mini Enterprises would sell to help smokers (GX 1A, 1C, 1D, 1F, 1G, 1H). He found no evidence of any finders' fees or fees for outside persons. The application was approved by the bank (GX 1R) and recommended for a guarantee by the SBA (GX 1B). The SBA approved the loan.

#### **e. The Modern Century payoff (74 Cr. 1051)**

In the meantime the Modern Century loan closing had been scheduled for November 6, 1972. Hero instructed

Saks to meet him after the closing at 1:00 p.m. at the Shun Lee Dynasty restaurant with \$35,000 in cash (Tr. 619). On November 6th, after receiving the \$350,000 from Underwriters, Saks and Repass obtained \$38,000 in \$100 bills (GX 16C; Tr. 626) and went to the Shun Lee Dynasty, where they met Saks' girlfriend, Sylvia Bailey (Tr. 453). Hero arrived and went directly into the men's room followed by Saks who gave him the \$35,000 in cash in a brown envelope. Hero counted the money and then he and Saks left the men's room (Tr. 631, 817-20). Saks returned to the table and Hero left.

Devins had previously instructed Saks to pay the other \$35,000 by a \$31,000 certificate of deposit and two checks for \$2,000, one drawn to him and one to Hero (Tr. 623). On November 10, 1972 Saks drew the two \$2,000 checks as instructed (GX 16A, 16B; Tr. 633) and purchased a \$31,000 certificate of deposit (GX 17), all of which he gave to Devins (Tr. 624). Thereafter Modern made three payments on the loan and then defaulted (Tr. 624).\*

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\* Repass also testified that Randell and Devins proposed that they obtain a \$375,000 SBA loan for Saks' defunct corporation, Illustrated Lincoln Readers. The roles played by Devins, Randell and Hero were to be the same as in the Modern Century loan. Specifically, Hero would deliver the SBA. The compensation was to be similar, with 10 percent being distributed among Randell, Devins, Hero and others (Tr. 459). In a hearing out of the presence of the jury, counsel for Hero attempted to prevent the government from introducing evidence of the Illustrated loan on the grounds that the jury had enough to contend with. The court correctly noted that proof of other crimes was admissible to show motive, intent, or a common scheme or plan (Tr. 463), but decided to strike and exclude the evidence in the exercise of its discretion on the ground that it would be cumulative and have little probative value (Tr. 468, 471). The government did not press the point in view of what it felt was the overwhelming proof of Hero's guilt (Tr. 472, 474).

#### **f. The Mini payoff (74 Cr. 1055)**

The Mini loan closing was scheduled for December 8, 1972 (Tr. 174, 296). Catale was instructed by Devins to pay, within 48 hours, \$47,500 to Hero and \$7,000 to Devins for Randell.\*

On December 8th Mini received \$350,000 from Underwriters. A few days later Catale cashed eight checks totalling \$47,500 (GX 4A) and delivered the cash to Hero in the lobby of the Pan Am Building in New York City. At that time Hero said that he had done this quite often and he would have taken his \$7,000 by check (Tr. 239). Catale cashed another check for \$7,000 (GX 4B) and gave the money to Devins (Tr. 184). Nearly all of the remaining money went directly to Smokewatchers or was invested in certificates of deposit which were pledged as collateral with respect to loans to Smokewatchers. Mini made 4 payments and defaulted on the loan. Smokewatchers did not repay any portion of the loan.

#### **g. The Smokewatchers Extortion\*\***

Beginning in late December of 1972, Costa prepared another application for an SBA guaranteed loan for

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\* Catale would keep \$15,500 as his commission of 2% for both the Modern Century and Mini loans (Tr. 177-178). Of that amount, \$7,000 was Devins' cut for Mini, which he relinquished to Catale as his commission on the Modern Century loan. The extra \$1,500 resulted from Catale dickering with Hero to increase his cut (Tr. 179-181). He actually took \$15,750 (GX 4C).

\*\* While the court dismissed 74 Cr. 1054 for failure of the government to prove either a conspiracy or extortion, the court declined to strike the facts relating to the same which were left for the jury's consideration as evidence of similar acts to prove the existence of a scheme to bribe SBA officials. In dismissing the indictment Judge Gaglardi found that Hero was soliciting a bribe on behalf of his friends in the SBA and not extorting money

[Footnote continued on following page]



Smokewatchers, without the knowledge or assistance of Randell, Devins or Hero (Tr. 188, 300). In March of 1973 he submitted it to Bankers Trust which approved it on March 25 or 26, 1973 and forwarded it to the SBA for its guarantee (Tr. 301). Almost immediately thereafter Hero called Catale and told him that Smokewatchers loan was being approved at the SBA but that his people had called him and said it would cost between \$65,000 to \$80,000 (Tr. 189). Catale referred Hero to Costa and then called Costa to tell him what had happened (Tr. 302). Hero called Costa and told him that the loan could not go through unless he paid the "boys" at the SBA \$60,000. Costa told Hero to go to hell (Tr. 302, 564-66). Hero promised Costa that in an hour his loan would be dead. In an hour Costa received a call from Leon Glackman, a vice-president of Bankers Trust, informing him that the loan had been rejected (Tr. 303-304, 361). Costa and Catale discussed the matter and decided to tell Hero they would pay (Tr. 191, 305). Upon learning this Hero instructed Costa to call Glackman and have him call the SBA to say the "magic words": "would they please reconsider the loan." Hero said that the SBA would then request three things: that Costa's wife sign the application or submit a letter explaining why not; a letter from Smokewatchers explaining the litigation status of the company; and a letter of recommendation from the bank (Tr. 306). Costa prevailed upon Glackman to call the SBA (Tr. 362) and as a result the loan was reopened. Glackman then assigned his assistant Joseph Colgan to see what the SBA required (Tr. 363) to supplement the application. Colgan was instructed to furnish the very same three documents

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(Tr. 1473). We respectfully suggest that that analysis may be in error since it may be possible for one both to extort in violation of Title 18, United States Code, Section 1952 and to *demand* a bribe in violation of Section 201(e). It is only a defense to Section 1952 if the *victim* is found to have *offered* a bribe in violation of Section 201(d).

Hero had described (Tr. 382). Costa submitted two of the requested letters (GX 6, 7) and on March 30, 1973, accompanied by Hero, went to pick up the letter of recommendation from Glackman (GX 8; Tr. 363-364). Hero reviewed the letter and then called an unknown person at the SBA and had Costa explain why his wife was not signing the application (Tr. 309, 560). That afternoon the three documents were submitted to the SBA whose records (GX 9) show that the loan was logged in on April 3, 1973. For his role in the foregoing, Hero demanded \$20,000 worth of unregistered Smokewatchers stock for himself (Tr. 194, 314, 549).

Subsequently, Catale and Costa agreed to cooperate with the authorities and consented to record conversations with Hero. During the course of the next several weeks Catale and Costa pressed Hero for the reason the loan was not forthcoming.\* Hero reassured them, boasting that, like other loans he had put through, the Smokewatchers loan would be approved also and that he had been responsible for putting the Modern Century loan through (Tr. 316). Hero referred to his friends in the SBA as being very high level individuals who had the situation totally in hand (Tr. 320-321).\*\*

#### **h. The Northstate conspiracy (74 Cr. 1053)**

During August or September of 1973 Repass, Saks and Hero discussed obtaining an SBA loan for Francis

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\* The real reason, unknown except to the Regional Director of the SBA and his counsel, was that the loan, which had been approved, was being held personally by the Regional Director until Hero's inside man could be ferreted out. Banker's Trust withdrew its approval on July 5, 1973 (GX 9; Tr. 366). In September, 1973 Smokewatchers went bankrupt.

\*\* A transcript of some of Hero's recorded conversations is found in GX 10, which is reproduced in the government's appendix.

Cheong.\* Hero said that for a total compensation of 12 percent—10 percent for the people inside and 2 percent for himself (Tr. 638)—he could make sure the loan was approved by the SBA. Saks began working on Cheong's application for a \$70,000 direct loan (GX 21A, B, F and G; Tr. 670-672),\*\* preparing a false purchase agreement, which showed that Cheung was to pay \$80,000 for a restaurant. On February 13, 1974 the application was submitted to the SBA (GX 22). As part of the loan processing, Cheung and Saks had to meet with a representative from SCORE,\*\*\* who recommended that Cheung not pursue the loan and subsequently submitted an adverse report (GX 21C, D, and E). Saks complained to Hero who instructed Saks to write a letter for Cheung to Joseph Spedale, the loan officer, protesting SCORE's decision. Saks did so and the loan was approved (Tr. 679). On April 18, 1974, the date of the loan closing, Hero asked for his 12 percent, or \$8,400. Saks expected to receive \$17,500 from Cheung, but received only \$10,000. Therefore, he did not pay Hero, who complained that he would have to draw \$7,000 from his bank account or mortgage his house to pay the people on the inside (Tr. 681, 873-874, 967).

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\* Erroneously "Shun" in transcript.

\*\* The SBA direct loan program deals with loans of government money rather than guarantees of bank loans (Tr. 52-53). Economic Opportunity loans to minority businessmen are included (Tr. 63-64). When an applicant for a direct loan appears at the SBA to obtain advice and receive a loan application, the loan officer who assists him may arrange to have the loan assigned to him for processing. Normally loans are assigned to loan officers at random. The loan officer who processed the Cheung and North-state loans was Joseph Spedale (Tr. 54).

\*\*\* The Management Assistance Program of the SBA utilizes SCORE volunteers (Service Corps of Retired Executives), who furnish management assistance and evaluate the quality of the loan applicant's business plans. They file reports which are relied upon by the loan officers (Tr. 59, 675).



In the meantime, on November 7, 1973 Saks and his girlfriend Sylvia Bailey submitted an application (GX 20) for a \$50,000 loan for Northstate Packing Company, a company created by Saks. The money was to be used for a business venture by Bailey and her nephew, Patrick Moore, who was listed as the president of Northstate. Hero told Saks to have Moore appear at the SBA to pick up his application (Tr. 658, 633) at a certain date and time and he, Hero, would make sure that one of his boys was on the desk at the time Moore came in (Tr. 661). Moore appeared as directed and was given an application which he gave to Saks, who then prepared it, fabricating all of the supporting documents (GX 19A-19I; Tr. 644-649, 655, 847-849). Hero told Saks that the latter would be required to pay him 12 percent, or \$6,000 (10 percent for the inside people at the SBA, 2 percent for Hero) (Tr. 652, 852-853).

On February 22, 1974, after Northstate Packing received its money, Saks gave Hero \$6,000 in cash (Tr. 667). Hero demanded and later received an additional "point", or \$500 for getting the loan through quickly (Tr. 667-668, 851).

In mid-June 1974 Hero told Saks that there was a new program for direct loans of \$100,000 each (Tr. 720). Saks discussed with Hero some \$100,000 loan applications that he wanted to submit for Clayton Camper and State Appliance. Each loan was to be fraudulent in nature since the companies did not exist. Saks and Sylvia Bailey were going to use the funds to purchase real estate in New York City (Tr. 723). Hero instructed Saks to appear at the SBA on June 25, 1974 with Bruce Bailey (the brother of Sylvia Bailey and the purported president of Clayton) and the completed application for Clayton Camper and to tell the receptionist that they had been there three or four weeks previously and had returned to submit their application. While the recep-

tionist was looking for the interview form,\* Joseph Spedale appeared (Tr. 701) and took the application (Tr. 710).

The State Appliance Company loan application was submitted June 26, 1974 in a similar manner. This time Saks, in disguise, accompanied by Sylvia Bailey went to the SBA office at the time specified by Hero and announced that they were there to submit their application. When another loan officer inadvertently received the application, Saks convinced him he had previously seen Spedale. Thereafter, Spedale received the application for processing (Tr. 972).

In the case of each of the four loans Hero advised Saks in the preparation of the applications, insuring that the proper ratios on the financial statements appeared (Tr. 722), and that certain key phrases to justify the loan to the SBA (*e.g.*, "to substitute long-term debt for short-term debt") were used (GX 11D and E, 19D; Tr. 725). Hero and Saks discussed the various loans and the payoffs in code over the telephone (Tr. 682-684).

On July 17, 1974 both loans were cancelled when Hero's people at the SBA became aware of an F.B.I. investigation of that agency (Tr. 726-7).

#### **i. The coverup by Hero and Saks**

Previously, on about November 15, 1973, Saks was contacted by Special Agent Francis M. Tober of the F.B.I., who made an appointment to meet with and talk to him on November 27th about the Modern Century loan. Prior

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\* When a loan applicant appears initially a record of the visit is made and filed. No record existed for Clayton or State Appliance prior to Saks' appearance.



to the meeting with Tober, Saks and Sylvia Bailey met with Hero at the Barclay Hotel in New York. Saks was concerned about explaining the \$35,000 in checks and the certificate of deposit. Hero suggested that Saks falsely tell Tober that these were payments partially for television time and partially for a commission due Hero on sales of Modern's encyclopedia to a supermarket chain (Tr. 729-731, 957-958). Saks met with Tober and told him that story, which Tober recorded (GX 27). Saks also denied to Tober that Hero, Devins and Randell had any involvement with the loan (Tr. 733).

Later, in July of 1974, Saks learned that Repass had been cooperating with the government and that the existence of the \$35,000 cash payment had been revealed. He met with Hero to discuss and plan their explanation of what purportedly had happened to the other \$35,000 in cash. Hero proposed that in order both to explain the money and to ruin Repass' credibility that Saks falsely state that Repass took the \$35,000 (Tr. 735).

#### **j. Saks cooperates**

In early September of 1974, after learning that the authorities were looking for him, Saks went to the United States Attorney's Office and offered to cooperate. He was arrested on a warrant for an indictment charging him with defrauding the government in connection with the Cheong loan (Tr. 737).<sup>\*</sup> As part of his cooperation Saks consented to have his conversations with

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<sup>\*</sup> 74 Cr. 778 was filed on August 5, 1974 in 13 counts. Saks subsequently pled guilty to two counts of false statements in violation of Title 18, United States Code, Section 1001. He also pled guilty to the conspiracy Count of 74 Cr. 1051. On November 17, 1975, he was sentenced to concurrent terms of 9 months' imprisonment and 15 months' probation on both indictments, which he is presently serving.

Hero recorded. On each of several occasions, Saks and Hero discussed the coverup story Saks would tell the Grand Jury (Tr. 740). The last conversation Saks had with Hero was shortly after Hero's arraignment, in December of 1974, in which Hero attempted to enlist Saks' aid in fabricating a defense (Tr. 741-742).

### **Defendant's Case\***

Marcus George Hero, 48, was a financial management consultant, with a college degree and certain post-graduate training (Tr. 1145). He worked in various banking jobs before joining the SBA in 1961. Thereafter he held various positions in the SBA in the investment division until 1966 when he resigned to go into private business. From that time until the present he has been self-employed (Tr. 1152).

Hero was introduced to Devins in the fall of 1972 by Randell whom he had met several years previously through the SBA. In October of 1972, Hero reviewed the Mini application at Randell's request—assertedly from a technical point of view only (Tr. 1153)—as a favor for Randell and to make some banking contacts through Catale, who worked for the Kennedys (Tr. 1162). Hero denied furnishing any of the figures (Tr. 1156, 1334) or asking for or receiving any money for his services (Tr. 1161-1162, 1265, 1279, 1337).

Hero also met Saks and Repass at Randell's office in the fall of 1972 (Tr. 1166). Hero testified he saw the Modern application when Repass brought it to his home for review one morning, but had no knowledge of its

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\* In addition to his own testimony, Hero called three character witnesses. However, none had any knowledge of Hero's business dealings or reputation (Tr. 1196, 1206, and 1211).

contents and reviewed it from a technical point of view only (Tr. 1169, 1324). He denied asking for or receiving any payment for his services, explicitly denying the receipt of the \$35,000 at the Shun Lee Dynasty restaurant (Tr. 1171, 1309, 1382).

Sometime in April 1973 Hero was told by Catale and Costa that Smokewatchers needed a loan. Costa asked for help in expediting his loan. Hero said he could not assist and that he did not think anyone else could. At Costa's urging, however, he went to the bank to talk to Glackman, Glackman did not want to become involved, but said that Mr. Colgan, who was on vacation at the time would do anything they requested (Tr. 1179). Hero said he advised Costa to get letters in support of the loan. According to Hero, Costa then called the SBA impersonating Colgan who was absent. As a result of the conversation, Costa was told to procure the three letters (GX 6, 7 and 8; Tr. 1182).

Costa and Catale also told Hero they were having trouble with a shareholder (Tr. 1177) and then asked Hero to "play-act" in various telephone conversations, which were to be overheard by the dissident shareholder (Tr. 1268, 1343). These conversations were designed to convince the shareholder that Hero had influence and that the SBA loan would be approved (Tr. 1186-1187). Hero flatly denied demanding any money or stock from Smokewatchers or threatening to kill the loan or even speaking to anyone at the SBA about it (Tr. 1187, 1338-1340).

Hero denied having anything to do with the preparation or approval of the Northstate and Cheung loans, other than to review the applications from a technical point of view (Tr. 1214, 1220, 1233, 1236-1237, 1369, 1372-1373) and he denied receiving any money for the SBA loans (Tr. 1368). He also denied having anything



to do with the Clayton Camper or State Appliance loans (Tr. 1226, 1233).

In September of 1974 Saks came to Hero's house and told him he had been arrested for the Cheung loan. Saks was depressed because of all of the problems he had and wanted Hero to speak to the "boys at SBA" in an effort to get him out of trouble on the Cheung loan. In an effort to explain the taped conversation of October 15th (at 28), Hero said he was forced to "placate" Saks in order to calm him and to learn what was going on, because he too was under investigation (Tr. 1231-1232).

## ARGUMENT

### POINT I

**Hero's consolidated trial on the four indictments before a single jury was entirely proper.**

Hero, the sole defendant in the proceedings below, assigns as reversible error the consolidation and trial before a single jury, over his objection, of the four indictments in which he was named. The assertion is baseless. All of the offenses alleged in the four indictments were of the same or similar character, occurred within a span of 20 months, and could properly have been joined in a single indictment. Under such circumstances, the District Court's consolidation of the four indictments for a single trial was an entirely sound exercise of its discretion.

Rule 13 of the Federal Rules of Criminal Procedure authorizes two or more indictments to be tried together "if the offenses . . . could have been joined in a single indictment . . . ." Rule 8(a) of those Rules permits the joinder in a single indictment of two or more offenses "if the offenses charged . . . are of the same or similar

character. . . ." See *United States v. Nadler*, 353 F.2d 570, 571 (2d Cir. 1965). Where a single defendant, alone, is being tried it is entirely proper to consolidate indictments containing offenses of the same class, even though those offenses are not otherwise "connected together". Rule 8(a), Fed. R. Crim. P. See, e.g., *Williams v. United States*, 168 U.S. 382 (1897); *United States v. Marionne*, 514 F.2d 1244, 1248 (5th Cir. 1975); *United States v. Welsh*, 15 F.R.D. 189, 190 (D.D.C. 1953). Here, moreover, consolidation of the four indictments was proper, *a fortiori*, since the offenses alleged were not only of the same or similar character but were as well, "connected together" and constituted part of defendant Hero's single course of conduct. In these circumstances the trial court's determination to consolidate was an unassailable exercise of its clearly authorized discretion—which may not now be upset absent a showing of an abuse of that discretion. *United States v. Weber*, 437 F.2d 327, 331 (3d Cir. 1970), *cert. denied*, 402 U.S. 932 (1971); *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 635 (2d Cir.), *cert. denied*, 329 U.S. 742 (1946).

Three of the four pertinent indictments (74 Cr. 1051, 74 Cr. 1053 and 74 Cr. 1055), charged Hero (and others who did not stand trial) with offenses which occurred within a period of 20 months and which were of virtually identical character. Count One of each indictment alleged a conspiracy (a) to defraud the United States and the SBA in connection with the acquisition of specified loans or loan guarantees from the SBA by means of, *inter alia*, bribery of SBA officials and the submission of false statements to the SBA and participating lending institutions; and (b) to violate 15 U.S.C. §§ 645(a) and 18 U.S.C. §§ 201, 1001 and 1014 all in violation of 18 U.S.C. § 371. Counts Two and Three of each of those indictments charged Hero (and others who did not stand trial) with having violated 18 U.S.C. §§ 1001, 1014 by having submitted to the SBA (§ 1001) and the per-

tenant lending institution (§ 1014) certain false and fraudulent loan applications.

Although the fourth indictment, 74 Cr. 1054, charged Hero with nominally different crimes—a conspiracy and substantive offense under the Hobbs Act, 18 U.S.C. § 1951—they were in truth cognate offenses to those pleaded in the other indictments. The pertinent pleadings and proof under Indictment 74 Cr. 1054 made clear that Hero's alleged misconduct occurred within the time frame common to the other charges and consisted of demanding a payoff from one who had submitted an application for an SBA guaranteed loan of \$350,000—the payoffs to be used by Hero, in large measure, to bribe corrupt SBA officials in order to gain favorable consideration for the loan application.\*

Even if it somehow could be argued that the crimes charged were not of the "same or similar character" and therefore not properly consolidated on that ground, it is clear at the very least that the charges in question arose out of two or more acts or transactions "connected to-

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\* The trial court's dismissal of Indictment 74 Cr. 1054 at the close of all the evidence (Tr. 1471), further confirms the similarity of the offenses alleged therein with those set forth in the other indictments. In dismissing the substantive Hobbs Act offense the trial court said, for example, that the proof adduced tended to establish not that Hero had "extorted" any money from the loan applicant, as required by 18 U.S.C. § 1951, but rather that Hero had solicited a bribe which was to be shared with corrupt SBA officials in order to secure SBA approval for the loan application, which was otherwise unobtainable (Tr. 1473). This misconduct of Hero's was substantially similar to that alleged in the other indictments and, for that reason, the trial court permitted the prosecution to argue to the jury—notwithstanding the dismissal of the charges themselves—that the proof of the same constituted a "similar act" probative of Hero's guilt with respect to the crimes actually submitted to the jury for its consideration.



gether", Rule 8(a), Fed. R. Crim. P., and that, accordingly, they could properly have been consolidated on that ground alone. Each of the bogus loan applications which gave rise to the offense charged was a part of a consistent and more or less continuous course of conduct on Hero's part aimed at defrauding the SBA and related private lending institutions out of large sums of money which were thereafter misapplied. In each instance Hero played substantially the same role and employed much the same means (false statements, undisclosed kickbacks and bribery) to accomplish his illicit ends; and each of several of his alleged co-conspirators (Devins, Randall, Saks, Catale) played a key role in not one, but several, of the bogus transactions. In view of the similarity of the offenses charged, the necessarily overlapping nature of the proof in support of each, the common factual and legal issues involved and the judicial economies of time and expense, it may well have been an abuse of discretion for the trial court *not* to have ordered a consolidated trial before a single jury. See *United States v. Rosenthal*, 470 F.2d 837, 845 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973).\*

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\* Although Hero currently asserts (Brief at 25) that during the course of the trial the prejudice to him occasioned by the consolidated proceedings "became manifest", he never once moved for a severance during the trial itself, see *United States v. Nadler*, *supra*, 353 F.2d at 571, and even now he is unable to point to any specific part of the record as concrete evidence of any supposed prejudice to him. His general reliance on the supposed complexity of the trial and the multiplicity of conspiracy charges is misplaced. As observed by the trial judge, the case was not complex (Tr. of March 17, 1975, p. 4) and, as noted *infra*, p. 26, the proof of the several conspiracies would have been admissible at the trial of any one of the indictments alone. Moreover, by reason of the trial court's dismissals of two of the conspiracy counts, only the two remaining conspiracy charges were actually submitted to the jury for its consideration (Tr. 1608). In any

[Footnote continued on following page]

Moreover, even if each indictment had been tried separately, proof of the transactions giving rise to the offenses in the other indictments would have been admissible as evidence of prior and subsequent similar acts probative, at a minimum, of Hero's criminal design, knowledge and intent. *United States v. Papadakis*, 510 F.2d 287, 294-295 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). Since the evidence adduced below would thus have been admissible at the trial of any one of the indictments, consolidation of all was entirely correct. *United States v. Smith*, 112 F.2d 83, 85 (2d Cir. 1940).

Finally, Hero claims that the prosecution committed reversible error when it introduced evidence of other nearly identical, but uncharged, misconduct of his, designed to defraud the SBA.\* The claim is wholly without merit. The trial judge correctly recognized that the challenged proof relating to the proposed SBA guaranteed loan for Illustrated Lincoln Readers, Saks' defunct corporation, was admissible as proof of a similar act probative of the crimes charged (Tr. 468); and withdrew that proof, consisting of a total of approximately four of the 1699 pages of trial transcript, from the jury's consideration based solely on his finding that such proof was cumulative and therefore of little additional pro-

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event, the fact that several counts may be more difficult to try than one does not of itself give rise to prejudice warranting relief. *United States ex rel. Tarallo v. LaVallee*, 433 F.2d 4, 6 (2d Cir. 1970), *cert. denied*, 403 U.S. 919 (1971). Finally, Hero's claim that he was prejudiced because in taking the stand he was forced to defend against all, rather than just some, of the pending charges is equally unavailing. Absent some particularized showing of prejudice to his trial strategy, a defendant has no right to elect, by way of a severance, to testify as to some counts or indictments and not others. *United States v. Williamson*, 482 F.2d 508, 512 (5th Cir. 1973).

\* Hero's contentions in this respect are set forth in Point II of his brief, pp. 28-31.



bative value (Tr. 468).<sup>\*</sup> In any event, any conceivable prejudice to Hero was wholly dissipated by the trial judge's admonition to the jury to disregard the minimal proof in issue (Tr. 474). Hero can hardly complain since the trial court's ruling afforded him more than the law required.

Finally, Hero's claim (Brief at 30) that he was fatally prejudiced by the proof relating to the Century Development Company (Tr. 640) is frivolous. The sole testimony elicited on that subject consisted of Saks' affirmation that he knew of that company (*id.*). The trial court then intervened, *sua sponte*, and precluded any further questioning on that subject (Tr. 641). There is simply no basis in the record for even a colorable argument that Hero was thereby somehow prejudiced.

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<sup>\*</sup> The challenged evidence pertained to the conversation in the fall and winter of 1972 between and among co-conspirators Randell, Devins, Saks and Repass in which they discussed their plans to obtain, with Hero's assistance, a \$375,000 SBA guaranteed loan for Illustrated Lincoln Readers and in so doing to defraud the SBA by the very same means employed in all the other bogus loan transactions (Tr. 457-461). That proof constituted, at minimum, evidence of similar acts tending to prove the existence of the devices and schemes to defraud with which Hero was charged. *United States v. Papadakis, supra*. Moreover, the proposed Illustrated Lincoln Readers transaction, though never consummated, was intended to be a carbon copy of the nearly contemporaneous Modern Century transaction. As such, it could fairly be said that the proposed Illustrated Lincoln Readers loan acquisition was an object of the very conspiracy charged in Count One of the Modern Century indictment, 74 Cr. 1051, and proof of the same therefore admissible on that ground alone.

## POINT II

**The District Court correctly denied Hero's motion for a new trial premised on alleged "newly discovered evidence".**

Hero contends that the trial court erred in denying his new trial motion pursuant to Rule 33, Federal Rules of Criminal Procedure, premised on alleged "newly discovered evidence". The contention is utterly without merit.

"A motion for a new trial based on newly discovered evidence is addressed to the discretion of the trial court. *United States v. Silverman*, 430 F.2d 106, 119 (2d Cir. 1970), [*cert. denied*, 402 U.S. 953 (1971)]; *United States v. Lombardozi*, 343 F.2d 127, 128 (2d Cir.), *cert. denied*, 381 U.S. 938 (1965); *Brown v. United States*, 333 F.2d 723, 724 (2d Cir. 1964). It is 'not favored and should be granted only with great caution,' *United States v. Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). . . ." *United States v. Sposato*, 446 F.2d 779, 781 (2d Cir. 1971). The accepted criteria for the granting of a new trial on the ground of newly discovered evidence are (1) the defendant must satisfy the court that the asserted new evidence is such and could not with due diligence have been discovered before or, at the latest, at trial, (2) the evidence must be material to the factual issues at the trial and not merely cumulative of evidence already introduced on impeaching the character or credit of a witness, and (3) it must be of such a nature that it would probably produce a different verdict in the event of a retrial. *United States v. Polisi*, 416 F.2d 573, 576-577 (2d Cir. 1969). *Accord*, *United States v. Stofsky*, Dkt. No. 74-1860 (2d Cir. Nov. 7, 1975), slip op. 515, 527-531; *United States v. Schwartz-*

*baum*, Dkt. No. 74-1901 (2d Cir., Nov. 7, 1975), slip op. 461, 468-469. In the instant case, the asserted new evidence on which Hero relies was neither "newly discovered" nor would it probably produce a different verdict in the event of a retrial. Accordingly, the motion was correctly denied.

The asserted new evidence here consisted of a tape recording of a post-trial conversation between one Joseph Spedale and an individual who formerly had paid bribes to Spedale and who, unbeknownst to Spedale, was then cooperating with the government and tape recording the conversation.\* During the recorded conversation, Spedale in substance denied he had ever been bribed by, or otherwise involved with, Hero in connection with the fraudulent approval of loan applications submitted to the SBA.\*\* Hero apparently first learned of the existence of the tape through Spedale, who himself learned of its existence from the government, after the filing of an indictment against him.\*\*\* In a letter dated August 22, 1975, in response to Hero's request for a copy of the

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\* The evidence at trial tended to show that Spedale, while an SBA employee, had been the recipient of payoffs and bribes from Hero in return for his approval of bogus loan applications.

\*\* Neither the tape recording, nor any transcript of the same, was ever received as an exhibit in any of the proceedings below. A transcript of the recording will be available at oral argument of this appeal should this Court desire to see the same.

\*\*\* Indictment 75 Cr. 598, filed on June 19, 1975, in 10 counts, charged Spedale, as an SBA employee, with having accepted bribes and gratuities on three occasions, and with, on three occasions, having used the color of his official office to extort money (18 U.S.C. §§ 201(c) and (g), 871). He was also charged with one count of perjury before a federal grand jury (18 U.S.C. § 1623). Spedale died of a heart attack on August 12, 1975.



tape,\* the government declined to provide Hero with a copy of the tape, and advised the trial court and Hero's attorney that the tape had no value to Hero and that the post-trial statements by Spedale, on which Hero relied, were apparently made by Spedale during his attempt to suborn the perjury of the individual who previously had paid bribes to him and who was meeting with him

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\* The letter in question, referred to at the time of Hero's sentence, was as follows:

August 22, 1975

Honorable Lee F. Gagliardi  
United States District Court  
United States Courthouse  
Foley Square  
New York, New York 10007

Re: United States v. Hero,  
74 Cr. 1051, 1054, 1055.

Dear Sir:

We have received a copy of Mr. Gotkin's letter of August 18, 1975.

Mr. Gotkin refers to tapes made of Spedale's conversations with a government informant. These conversations, which took place after the Hero trial, were an entirely self-serving attempt to convince the informant that Spedale had only dealt with him and no one else in his bribe taking activities. This was attempted during the course of plans between Spedale and the informant to cover up their activities and was obviously an attempt to lull the informant into a sense of security in dealing with Spedale in the event it became necessary to commit perjury. Obviously they have no value whatever to Hero as he had the privilege of producing Spedale at trial to testify.

Very truly yours,

PAUL J. CURRAN  
United States Attorney

By: /s/ George E. Wilson  
GEORGE E. WILSON  
Assistant U. S. Attorney

cc: Martin E. Gotkin, Esq.  
250 West 57th Street  
New York, New York 10019



ostensibly to discuss their respective exposure to discovery by the authorities.

While Hero's brief on this point is somewhat confused, it seems clear that the alleged "newly discovered evidence" on which he now relies cannot possibly be the tangible tape recording itself. The recording, containing as it does the post-trial, self-serving declarations of Spedale, is rank hearsay which, if offered for its truth, would clearly be inadmissible at any new trial of Hero.

Hero's claimed "new evidence", then, is reduced to the knowledge, supposedly provided by the tape for the first time, that Spedale would deny that Hero was the source of any payoffs or bribes. Hero, however, can hardly assert that this position of Spedale's was not known to him until he learned of the tape. Hero acknowledged that he and Spedale were friends and that even prior to his trial he and Spedale had discussed the investigation (Tr. 1402). There was nothing said by Spedale on the tape recording after trial which Hero was not privy to in advance of his trial. Indeed, if, as Hero asserts, it were true that he had never made payoffs to Spedale, that fact would surely be best known to Hero, himself, even absent any pretrial communication with Spedale. Accordingly, Spedale's putative testimony to that effect was available to Hero at the trial below. Hero, however, specifically declined to call Spedale as his witness (Tr. 709), and made no request that Spedale be called as the court's witness. By his failure to do so, Hero waived any right to rely on Spedale's expected testimony as the basis for a new trial. *United States ex rel. Regina v. LaValle*, 504 F.2d 580, 583 (2d Cir. 1974), *cert. denied*, 420 U.S. 947 (1975); *United States v. Marquez*, 363 F. Supp. 802, 808 (S.D.N.Y. 1973) (Weinfeld, J.), *aff'd on the opinion below*, 490 F.2d 1383 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United*

*States v. Pordum*, 451 F.2d 1015, 1017 (2d Cir. 1971), *cert. denied*, 405 U.S. 998 (1972).\*

Finally, in light of the overwhelming evidence of Hero's guilt, the trial court's finding that the evidence of Spedale's self-serving denial of any criminal involvement with Hero would not have affected the jury's verdict (Tr. of Nov. 18, 1975, p. 5)—much less probably produce a different verdict at a retrial—was clearly correct. It may not now be disturbed unless clearly erroneous. *United States v. Parness*, Dkt. No. 75-1369 (2d Cir. Jan. 12, 1976); *United States v. Zane*, 507 F.2d 346, 348 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

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\* Hero's current suggestion that he did not call Spedale because the latter would have invoked his Fifth Amendment privilege (Brief at 33) only serves to confirm the obvious fact that the evidence now relied on was known to Hero at trial and is in no sense "newly discovered". Moreover, Hero has utterly failed to establish that Spedale was truly unavailable to him at the time of trial—which was prior to Spedale's indictment. This Court has said that "[t]he only way adequately to establish unwillingness of a witness to testify is to compel the presence of the witness and test the question before the court." *United States v. Sanchez*, 459 F.2d 100, 102 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972).

## CONCLUSION

The judgments of conviction should be affirmed.\*

Respectfully submitted,

THOMAS J. CAHILL,  
*United States Attorney for the  
 Southern District of New York,  
 Attorney for the United States  
 of America.*

GEORGE E. WILSON,  
 JOHN C. SABETTA,  
*Assistant United States Attorneys,  
 Of Counsel*

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\* Hero's other contentions raised in his supplementary brief are equally without merit. The bulk of his claims are merely restatements of his attacks on the credibility of the government's witnesses, already once rejected by the jury. Giving due weight to the jury's right to determine issues of credibility, the evidence adduced at trial was more than sufficient to warrant a finding by twelve reasonable jurors that Hero was guilty beyond a reasonable doubt. See *United States v. Frank*, 494 F.2d 145, 153 (2d Cir.), cert. denied, 419 U.S. 828 (1974).

Hero's contention that reversal is warranted because assertedly the jurors ignored the actual recordings of his intercepted conversations and relied instead on the prosecution's transcripts of the same is frivolous. No such incident was ever brought to the trial court's attention by Hero and, accordingly, he is precluded from assigning it as a ground of error now. Moreover, Hero's assertion that one or more jurors was flipping through the pages of the transcript, even if true, provides no evidence that those jurors were not listening to the tapes, but relying instead on the transcript—the accuracy of which, in any event, was conceded by the defense at trial (Tr. 759). Finally, the trial court instructed the jury that it was the tape recording—not the transcript—which constituted the pertinent evidence (Tr. 764).







AFFIDAVIT OF MAILING

STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

Alice Prokopik being duly sworn,  
deposes and says that she is employed in the office of the  
United States Attorney for the Southern District of New York.

That on the 27th day of February, 1976  
she served a copy of the within Appeal Brief  
by placing the same in a properly postpaid franked envelope  
addressed:

Martin E. Gotkin, Esq.  
250 West 57th Street  
New York, New York 10019

And deponent further says that she sealed the said envelope  
and placed the same in the mail drop for mailing  
the United States Courthouse, Foley Square,  
Borough of Manhattan, City of New York.

Alice Prokopik

Sworn to before me this

27 day of February 1976  
Lynwood Hayes

LYNWOOD HAYES  
Notary Public, State of New York  
No. 41-1720825  
Qualified in Queens County  
Cert. filed in New York County  
Commission Expires March 30, 1977